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Supreme Court, U.S.
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No. 99-6218

In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

REPLY BRIEF FOR THE PETITIONER

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21 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. The year-and-a-day rule is a substantive rule of law 1

2. General ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature 8

3. The purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree 10

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Ball v. United States, 140 U.S. 118 (1891) 3, 4

Bouie v. City of Columbia, 378 U.S. 347 (1964) ... 10, 12, 13

Cole v. State, 512 S.W.2d 598 (Tenn. Crim. App. 1974) 6

Collins v. Youngblood, 497 U.S. 37 (1990) 5

Frank v. Mangum, 237 U.S. 309 (1915) 11

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 13

Louisville, Evansville & St. Louis R.R. Co. v. Clarke, 152 U.S. 230 (1894) 3, 4

Lynce v. Mathis, 519 U.S. 433, 117 S.Ct 891 (1997) ... 11, 14

Marks v. United States, 430 U.S. 188 (1977) 12

Percer v. State, 103 S.W. 780 (Tenn. 1907) 6

State v. Rogers, 992 S.W.2d 393 (Tenn. 1999) ... 1, 6, 7, 8, 15

State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995) 6

United States v. Chase, 18 F.3d 1166 (4th Cir. 1994) ... 4, 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV § 1 14

TABLE OF AUTHORITIES

Page

MISCELLANEOUS

3 Coke, Institutes at 53 4

The Commercial Appeal, March 27, 1999, Section B3, 1999 WL 4142499 16

HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960) 2, 12

Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WMS. U. L. REV. 35, 55-56 (1997) 13, 14, 15

Donald E. Walther, *Taming A Phoenix: The Year-And-A-Day Rule in Federal Prosecutions for Murder*, 59 U. CHI. L. REV. 1337, 1338 (1992) 3

WAYNE R. LAFAVE, CRIMINAL LAW § 1.2(a) & (b), pp. 7-8; § 3.1, pp. 193-195 (West 2000) 2

WHARTON ON HOMICIDE (3d ed.) 6

ARGUMENT

1. The year-and-a-day rule is a substantive rule of law.

In the Tennessee Court of Criminal Appeals, the State argued the year-and-a-day rule was a substantive rule of law.[1] In the Tennessee Supreme Court, the State conceded the rule was a substantive principle of state law.[2] For the first time, in its brief in this Court, the State takes the position the rule "was not an *element* of homicide, but was merely an exclusionary rule of evidence relating to causation."(emphasis added) (p. 21). In couching its argument in this fashion, the State demonstrates either a misunderstanding of the nature of substantive criminal law, or an attempt to shift the Court's focus away from the issue of whether the rule was substantive.

A. The State's Brief is based on a misunderstanding of the nature of substantive criminal law.

The State's Brief did not specifically respond to the contention that the rule was substantive in nature, yet such an argument can be implied from its claim that the rule is "merely an exclusionary rule of evidence." The State erroneously concludes that "substantive" criminal law refers only to the statutory elements of an offense.

Substantive criminal law consists of (1) definitions of specific crimes, (2) broader general principles applicable to more than a single crime *and so not made a part of the*

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[1] The State argued that the rule constituted a legal defense.

[2] *See State v. Rogers*, 992 S.W.2d 393, 399 (Tenn. 1999) (J.A. 26).

definitions of specific crimes, and (3) some even broader propositions of law, the basic premises which underlie the whole of the substantive criminal law. See WAYNE R. LAFAVE, CRIMINAL LAW § 1.2(a) & (b), pp. 7-8; § 3.1, pp. 204-206 (West 2000).[3]

As LAFAVE explains, traditionally, the first type includes the actus reus, mens rea and, in some offenses, attendant circumstances and a specified result. The second type includes "defenses," while the third type encompasses such general principles as the requirements of "causation," "concurrence" and the "year-and-a-day"

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[3] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 17 (2d ed. 1960), refers to these three types as "rules," "doctrines," and "principles." As an example, LAFAVE explains that substantive criminal law:

> is concerned with much more than is found in the definitions of specific crimes, for there are many general principles of the substantive criminal law which apply to more than a single crime – for instance, the principle that an insane person cannot be guilty of any crime, or that one coerced into committing what would otherwise be criminal conduct cannot be guilty of most crimes. Thus criminal battery is sometimes defined as 'the intentional or reckless application of force to the person of another, directly or indirectly.' The definition does not continue: ' . . . by one who is not legally insane; not legally too young; not too intoxicated to have the necessary state of mind; who was not coerced . . . ; and who was not justified because he acted in self-defense, or pursuant to domestic authority, or because the other person consented,' and so on. See LAFAVE, *supra*, at pp. 7-8.

rule.[4] Thus, the State's conclusion that the rule cannot be substantive where it was not included in the statutory elements of the offense is wrong.

B. The State's detailed recitation of the origins and development of the common law rule support the Petitioner's assertion that the rule was substantive in nature.

The State summarizes the origin and general development of the common law year-and-a-day rule. Most of this recitation further supports Petitioner's argument that the rule was substantive law. For example, the State acknowledges that Lord Coke included the rule in the definition of murder (pp. 16-17), and cites Donald E. Walther, *Taming A Phoenix: The Year-And-A-Day Rule in Federal Prosecutions for Murder*, 59 U. CHI. L. REV. 1337, 1338 (1992), for the proposition that at some point in its history the rule made a transition from a statute of limitations to "a principle of law in homicide cases" (p. 15).[5]

The State mistakenly seeks support for its contention that the rule was merely evidentiary in two opinions of this Court – *Ball v. United States*, 140 U.S. 118 (1891), and *Louisville, E. & St.L.R. Co. v. Clarke*, 152 U.S. 230, 241

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[4] The year-and-a-day rule could be considered a limitation on the actus reus of "killing," a necessary "attendant circumstance," or a general principle of law applicable to all homicides. However characterized, it is substantive in nature.

[5] Walther actually says on the page cited by the State that the rule evolved from a statute of limitations to a *substantive* principle of law. *Id.* at 1338.

(1894). In fact, the *Ball* Court reversed murder convictions, finding the underlying indictment fatally defective for failing to allege that the victim's death occurred within a year-and-a-day. As noted in *Ball*, "The controlling *element* which distinguished the guilt of the assailant from a common assault was the death within a year and a day." *Supra* at 133 (emphasis added). That language clearly suggests that the rule was considered substantive. Three years later, the *Clarke* Court addressed the rule again, acknowledging the general applicability of the rule in criminal cases, but holding it did not apply in civil cases. In discussing the rule, the Court said: "if a person alleged to be murdered die after that time, it cannot be discerned, as the law *presumes*, whether he died of stroke or poison, etc., or a natural death; and, in case of life, a rule of law ought to be certain."[6] (emphasis added). The Court's choice of the word "presumes" further implies that the rule was substantive. Although it is stated in *Clarke* that "[i]n prosecutions for murder the rule was one simply of criminal evidence," *supra* at 241, it has been suggested that this conclusion was dicta, as the issue before the Court was not the nature of the rule and did not involve its interpretation in a criminal context. *See United States v. Chase*, 18 F.3d 1166, 1172 (4th Cir. 1994). *See also*, Walther, *supra* at 1341, which suggests that both characterizations of the rule may be accurate in that it could be considered a "conclusive presumption that displays both substantive (*Ball*) and evidentiary (*Clarke*) facets."

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[6] Citing 3 Coke, Institutes at 53.

One of the most recent and detailed considerations of the rule is contained in *United States v. Chase, supra*. The *Chase* Court recognized that a conclusive or irrebuttable presumption must be considered a substantive rule of law, *id.* at 1172, n.7, and said: "Our review of both ancient and modern commentators and state court opinions discussing the rule convinces us that the year and a day rule is a substantive rule of law." *Id.* at 1173.

Finally, although the State catalogues various ways in which the rule has been "characterized" by different courts (pp. 18-19), the State's own characterization of the rule as an "exclusionary rule of evidence" is notably absent from this list. Further, it is neither the "label," nor the "characterization" put on a rule which determines if it violates ex post facto principles. *Collins v. Youngblood*, 497 U.S. 37, 46 (1990) ("simply labeling a law 'procedural,' . . . does not thereby immunize it from scrutiny under the Ex Post Facto Clause. Subtle ex post facto violations are no more permissible than overt ones."). Characterizing the rule as evidentiary will not insulate the State of Tennessee from Constitutional mandates. Whatever the label, the true test remains whether it made "changes in the substantive law of crimes." *Collins* at 45.[7]

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[7] The *Collins* Court stated that a law abolishing an affirmative defense would violate ex post facto concerns. *Id.* at 43.

C. The nature of the year-and-a-day rule as described by the Tennessee Courts is such as to render it a substantive principle of criminal law.

There is no question that on the day James Bowdery was stabbed, the rule was in full force and effect in Tennessee. *See Percer v. State*, 103 S.W. 780 (Tenn. 1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974); *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999) (J.A. 11-29); *State v. Ruane*, 912 S.W.2d 766 (Tenn. Crim. App. 1995) (describing the rule). However, the State insists none of these cases "affirmatively discloses the nature of the Tennessee rule,"(p. 21), except for *Rogers*, which it claims demonstrates that the rule is "evidentiary in nature." (p. 24). In fact, the aforementioned cases explicitly demonstrate that the Tennessee rule is substantive.

In *Percer*, *supra* at 782, the Tennessee Supreme Court, quoted approvingly *Wharton On Homicide* (3d ed.), p. 18, which said of the rule: "In murder, the death must be proven to have taken place within a year and a day from the date of the injury received." In *Rogers*, *supra* at 396, (J.A. 15), it cited this same quote for the proposition that it had recognized "the viability of the rule in Tennessee" since 1907. In *Cole*, *supra* at 601, the Tennessee Court of Criminal Appeals said of the rule: "The common law provides that death must ensue within a year and a day from the infliction of the mortal wound to constitute punishable homicide."[8] In *State v. Ruane*, *supra* at 774, the

[8] This quote from the Tennessee Court of Criminal Appeals was quoted with approval by the Tennessee Supreme Court in *Rogers*. (J.A. 15-16).

same Court said "[a]t common law, the proof must have established that the victim died within a year and a day from the date of the injury received." Thus, the Tennessee courts have consistently interpreted the common law year-and-a-day rule as an essential element of the proof which the prosecution was required to prove.

In addition to their general comments regarding the rule, the Tennessee Supreme Court, in rejecting the argument that the rule was nothing more than a defense, said: "While similar in some respects to a defense in a sense that it precludes conviction, the year-and-a-day rule *is even more powerful than a defense because it entirely precludes a murder prosecution.*" *Rogers*, *supra* at 400. (J.A. 23) (emphasis added). It is hardly plausible that the Court would recognize the rule is "more powerful" than a substantive rule of law, yet conceive of it as merely a rule of evidence. In addition, the quote indicates that the rule was considered a conclusive presumption, thus constituting a substantive rule of law.[9]

Further, in *Rogers* the Tennessee Supreme Court did not specifically adopt the characterization of the rule urged by the State. Nor did it characterize the rule as "merely an exclusionary rule of evidence,"(State's Brief p. 21), or specifically refer to the rule as merely being "evidentiary in nature." (State's Brief p. 24). Had the Tennessee Supreme Court deemed the rule nothing more than a rule of evidence without substantive implications, it

[9] In *Rogers*, the Tennessee Supreme Court, in discussing the history of the rule, utilized cases which referred to the rule as a conclusive presumption ("conclusively presumed") and an "irrebuttable presumption." (J.A. 18-19).

could have specifically said so. Further, there would have been no need for the Court to analyze the case under the *Bouie* doctrine and conclude that its "decision abrogating the rule is not an unexpected and unforseen judicial construction of a *principle of criminal law.*" *Rogers, supra,* at 402. (J.A. 28) (emphasis added).

2. General ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature.

Rather than address Petitioner's contention that the Legislature could not retroactively abolish the rule, the State recast the argument, claiming that the retroactive judicial abolition violated none of the four *Calder* categories. (State's Brief pp. 42-46).

According to the State, the first *Calder* category is not violated because the "statutory offense" does not include the rule. This stance ignores the fact that the Tennessee Supreme Court has, since 1907, interpreted state homicide statutes to include the rule despite the fact that no statute has ever explicitly included it. If the legislature had passed a law in 1999 abolishing the rule, it would have affected a substantive change in the law. Likewise, judicial abrogation of the rule changed the substantive law.

The State's contention that the second and third *Calder* categories were not violated also relies on the failure to include the rule in the explicit language of the statutory offense. The State reasons there can be no ex post facto violation since the abolition of the rule did not

change the specific wording of the statutory offense. As explained earlier, this argument relies upon a fallacious understanding of the nature of substantive criminal law. At the time of the victim's death the law then in effect forbade Petitioner's conviction for murder. A retroactive change in the substantive law which permits such a conviction, whether by legislative action or judicial decree, violates both the second and third *Calder* categories.

Finally, the State contends the fourth *Calder* category was not violated because the retroactive abolishment of the rule was a type of procedural or evidentiary change not contemplated by ex post facto principles. It argues that changes which "leav[e] untouched the nature of the crime and the amount or degree of proof essential to conviction," do not implicate ex post facto concerns. (State's Brief pp. 45-46). Again, the State's proposition is grounded on its failure to recognize that substantive criminal law includes matters beyond the statutory definition of an offense.

The year-and-a-day rule was substantive criminal law which created an absolute bar to prosecution and conviction. Prior to its abolishment, the State was required to prove both (1) causation and (2) death within a year and a day. Failure to prove either of these substantive principles resulted in an acquittal. The consequence of the rule's abrogation was to lessen the State's total burden of proof. The burden of proof as to "causation" was unchanged, while the burden of proof to convict was lessened by eliminating the separate requirement to prove death within a year and a day. Simply put, the two principles of substantive criminal law, causation and the year-and-a-day rule, are separate requirements of the law

which cannot be subsumed within each other.[10] Retroactive abolishment of the rule clearly violated the fourth *Calder* category.

3. The purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree.

In response to Petitioner's claim that the Fourteenth Amendment bars retroactive application of judicial rulings in criminal cases that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964), the State contends that (a) *Bouie* and its progeny should be interpreted only to prevent retroactive judicial decisions which violate the Due Process right to fair warning *that conduct is criminal* and (b) general ex post facto principles should have no application to judicial decisions through the Due Process Clause.

The State first contends that reference to the Ex Post Facto Clause in *Bouie* and its progeny is *dicta*, and *Bouie* should only prevent application of judicial decisions which violate the principle of fair warning *as to what conduct is criminal*. However, the State further contends:

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[10] The reason for the common law rule was not limited to difficulty in proving causation. (See J.A. 16-17).

> "Read in context, *Bouie*'s references to ex post facto principles thus reflect no more than a recognition that both constitutional provisions – the Ex Post Facto Clause and the Due Process Clause – share a common concern: the unfairness of criminalizing conduct, *or of escalating its penal consequences, after the fact*. (State's Brief p. 37) (emphasis added).

Thus, the State actually concedes that the Due Process Clause is concerned with more than simply fair warning that certain conduct is criminal, but also addresses the unfairness of escalating the penal consequences of a criminal act.[11] Petitioner contends that this is exactly what has occurred. The Tennessee Supreme Court has by retroactive judicial decree altered the substantive criminal law in such a way that the penal consequences of Petitioner's offense have been aggravated.

The State also asserts that application of ex post facto principles through the Due Process Clause would violate 200 years of precedent which holds that the Ex Post Facto Clause does not apply to the judiciary. See, e.g. *Frank v. Mangum*, 237 U.S. 309 (1915). Petitioner fully recognizes

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[11] "The presumption against retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. This doctrine finds expression in several provisions of our Constitution. The specific prohibition on ex post facto laws *is only one aspect of the broader constitutional protection against arbitrary changes in the law.*" *Lynce v. Mathis*, 519 U.S. 433, 439-440. (internal citations omitted) (emphasis added). The Court goes on to say that the Due Process Clause also protects against the retroactive application of new laws.

the continuing viability of the general rule that the Ex Post Facto Clause does not limit judicial action. This Court fully recognized this general rule in *Marks v. United States*, 430 U.S. 188, 191-192 (1977), but went on to hold that *under limited circumstances* due process prevents courts from obtaining the same prohibited result by judicial decree because the principles on which the Ex Post Facto Clause is based are so fundamental to the concept of constitutional liberty. Petitioner has not argued for the *unlimited* incorporation of the Ex Post Facto Clause via the Fourteenth Amendment. *Bouie*, its progeny, and Petitioner's argument all place a significant limitation on the application of ex post facto principles to judicial rulings. Due Process only prevents retroactive judicial rulings which are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." This limitation takes into account the fundamental differences between legislative and judicial law-making.[12] Because of these differences, courts may more freely apply their rulings retroactively than legislatures may

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[12] *Bouie, supra* at 354, adopts the limitation urged by Jerome Hall found at HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960), at 61. Hall considers the fact that under traditional theory all case law operates retroactively and that such a principle is an essential part of any legal system. "The important thing, therefore, is not the invalidity of the literal interpretation of the traditional theory in this regard but the actual quality of the adjudication. Specifically, is a decision retroactive only in the above unavoidable way or is it also unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue? . . . In any event, the inevitability of a slight 'normal' degree of retroactivity in judicial decision provides no ground for tolerating it in its obvious manifestations." HALL at 61.

retroactively apply legislation. So long as a judicial ruling is not "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" it may be applied retroactively without offending due process.

The State also asserts that such an interpretation of Due Process would "open up a boundless new frontier of litigation in criminal cases" and would transform a vast array of state law matters into federal issues. (pp. 40-41). In fact, the lower courts have already interpreted *Bouie* as applying ex post facto principles via the Due Process Clause to judicial rulings that are "unexpected and indefensible." See Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WMS. U. L. REV. 35, 55-56 (1997) ("Lower courts have extended the Supreme Court's due process analysis to unforeseeable judicial changes in sentencing structure as well, making the reach of the Due Process and Ex Post Facto Clauses congruent."). Despite these applications, the courts have not been inundated with *Bouie* claims and very few such claims have been successful. Krent, *supra* at p. 58.

The State further contends that forcing courts to apply their rulings retroactively will discourage departures from prior precedent and serve as a check on judicial lawmaking. It relies upon Justice Scalia's concurring opinion in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991), and Krent, *supra* at p. 82, as support. This reliance ignores Krent's commentary:

> That justification for full retroactivity, however, misses the point in the criminal law context. Little reason exists to think that judges will be

> reluctant to fashion new common law doctrines or interpretations of statutory language affecting the rights of criminal offenders due to the requirement of applying all new rulings to similarly situated offenders. Indeed the opposite is true. Judges may be tempted to change interpretations precisely in order to achieve a retroactive effect and punish particular offenders more harshly. Krent, at p. 83.

The State further argues Petitioner has offered no persuasive reason why ex post facto principles should be applied to judicial decrees via the Due Process Clause. However, Petitioner's opening brief argued that the principles on which the Ex Post Facto Clause is based, i.e fundamental justice, fair warning, and the prevention of arbitrary and vindictive changes of laws, are core concepts of constitutional liberty, and that the Due Process Clause prevents courts from applying judicial rulings in ways which impinge upon these principles. Each of these principles are implicated in the present case. In response to Petitioner's argument, the State attempts to argue that Due Process is only concerned with fair notice *that an act is criminal*. They offer no response to the "fundamental fairness" contentions and all but ignore the fact that "fair warning" has been interpreted to include more than the notion of fair warning that conduct is criminal.[13]

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[13] In addition, the concept of "fair warning" is not just limited to the time of the act. A criminal defendant is also entitled to fair warning of the law and applicable punishment subsequent to the act. See e.g. *Lynce v. Mathis*, 519 U.S. 433, 440 (1997) (Ex post facto laws protect "the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.")

Petitioner also raised the possibility that elected state judges may be susceptible to the same kind of influences which justify ex post facto limitations on legislatures. The State's response was simply that no authority had been cited for this contention. Yet its Brief relied heavily upon Krent, who concurs that: "On balance, therefore, state court judges, because of their interest in reelection, are more prone to the same kind of influences that arguably justify stringent judicial review of legislative retroactivity under the Ex Post Facto Clause." Krent, *supra* at 91-92.[14]

Finally, Petitioner contends that his argument for a *limited* application of ex post facto principles to judicial law-making via the Due Process Clause is more reasonable than the State's desire that courts have *unlimited and unbridled* power to retroactively alter substantive criminal law and aggravate an offense to the detriment of a citizen.

Remarkably, the State contends that "it is impossible to pinpoint exactly when the year-and-a-day rule ceased to operate in Tennessee." (p. 31). With such unlimited discretion to alter substantive law and no statute of limitations on murder, a defendant who committed an assault in 1970 could now be prosecuted for murder if the State could establish causation.[15] Further, the State's

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[14] The commentator cites the fact that one Tennessee Supreme Court Justice lost an election in 1996 because of her participation in an opinion favorable to a criminal accused. Krent, *supra* at p. 91, n. 232. See Amicus pp. 12-13.

[15] Tennessee prosecutors are already exhuming bodies of individuals who died more than a year after being assaulted and who died before *Rogers* abrogated the year-and-a-day rule.

logic, if carried to extremes, would permit the Tennessee Supreme Court to eliminate the common law requirement of causation and apply that change retroactively, as well. The need for repose suggests that retroactive alterations of substantive law require some limitations.

CONCLUSION

If this Court finds a violation of Due Process, Petitioner will still be subject to punishment for his criminal acts. This is not a situation where the Petitioner will escape justice. All he asks is that he face the law as it was at the time of his offense.

The opinion and judgment of the Supreme Court of Tennessee should be reversed. Retroactive application of the judicial abolishment of the year-and-a-day rule to Petitioner violates the Fourteenth Amendment of the United States Constitution. Accordingly, this case should be remanded to the Supreme Court of Tennessee for a determination as to whether Petitioner's sentence may be

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See The Commercial Appeal, March 27, 1999, Section B3, reported at 1999 WL 4142499.

modified to a lesser offense or whether a new trial is required.

Respectfully submitted,

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